UNITED STATES
v.
JOHN GAYANICH

IBLA 77-257 Decided July 14, 1978

Appeal from the decision of Administrative Law Judge R. M. Steiner declaring placer mining claim null and void (Context No. CA-2721).

Affirmed.

1. Administrative Authority: Generally -- Administrative Practice -- Administrative Procedure: Administrative Law Judges -- Attorneys -- Contests and Protests: Generally -- Practice Before the Department: Persons Qualified to Practice -- Rules of Practice: Generally

   Where, in a quasi-judicial departmental proceeding, an individual entered an appearance as attorney for a party to the action, and it was subsequently revealed that he was not qualified to practice before the Department under any of the provisions of 43 CFR 1.3, the presiding administrative law judge properly refused to continue to recognize his appearance or to permit him to continue to conduct the case in a representative capacity.

2. Administrative Procedure: Administrative Procedure Act -- Contests and Protests: Generally -- Mining Claims: Contests

   The Department of the Interior is lawfully empowered to initiate a contest pursuant to the Administrative Procedure Act to determine the validity of unpatented mining

> claims. This procedure makes no provision for 1) trial by jury, 2) advice to the contestant concerning his constitutional rights, 3) compensation to the contestant for the value of the claim if it is found to be invalid, or 4) appointment by the Department of qualified counsel to represent the contestant; and this procedure does not violate constitutional guarantees of due process, the General Mining Law, or the Administrative Procedure Act. Presentation of the contestant's case by counsel employed by the Forest Service in appropriate cases is permissible, and federal employees may testify as witnesses, and may conduct examinations and secure mineral samples on unpatented mining claims without a search warrant.

APPEARANCES: John Gayanich, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

John Gayanich 1/ appeals from the decision of February 18, 1977, by Administrative Law Judge R. M. Steiner, holding that the Home Plate placer mining claim is null and void. The claim is situated in Sierra County, California, in the Plumas National Forest. Contest proceedings to determine the validity of the claim were initiated by the Department of the Interior at the request of the Forest Service, Department of Agriculture. The claim was located for gold.

[1] The hearing was convened in Sacramento, California, on May 4, 1976. Charles Lawrence, of the Office of the General Counsel, Department of Agriculture, appeared for the contestant. Judge Steiner then made the following inquiry (Tr. 4):

> THE HEARING OFFICER: Sir, are you John Gayanich?
>
> MR. GAYANICH: Yes, I am, I'm John Gayanich.

1/ Mary Gayanich and Margaret J. Varenna were named as parties in the decision, but they have not appealed. We note that although Margaret J. Varenna's name does not appear on the contest complaint, she was served with a copy of the complaint. A letter dated June 9, 1975, from the State Office to appellant indicates that Mrs. Varenna disclaimed any interest in the mining claim.

THE HEARING OFFICER: Do you have an attorney?

MR. GAYANICH: I have counsel.

THE HEARING OFFICER: Who is your attorney?

MR. VANDERWATER: I am, sir, William Vanderwater.

Vanderwater then proceeded to conduct the contestee's case, making dismissal motions, raising objections, offering evidence, conducting direct and cross-examination of witnesses, etc. Throughout the hearing he was addressed as "Counsel" or "Counselor" by both the Judge and the lawyer for the Forest Service. The transcript reveals that he performed at a very poor standard of professional competence.

After the hearing was adjourned, the record had been closed, and the Government attorney had departed, Vanderwater approached Judge Steiner and disclosed that he was not a licensed attorney. Questioning by Judge Steiner further established that he apparently was not qualified to practice before the Department by any of the other provisions of 43 CFR 1.

Subsequently, Gayanich, acting for himself, moved to re-open the hearing for the purpose of presenting additional evidence. Although this motion was opposed by counsel for the contestant, Judge Steiner granted the motion and the hearing was re-convened in Sacramento on August 31, 1976. Again, William Vanderwater entered his appearance on behalf of the contestees as indicated by the following colloquy (Tr. 3-5):

THE HEARING OFFICER: Who is representing the Contestees?

MR. VANDERWATER: W. C. Vanderwater.

THE HEARING OFFICER: You are the same Mr. Vanderwater who appeared at the last hearing; are you not?

MR. VANDERWATER: I am, sir.

THE HEARING OFFICER: I believe, at the close of the last hearing, after counsel for the government had departed the hearing room, you approached the bench and advised me that you had hoped you had not misled anyone, but you were not admitted as a practicing attorney in California; is that correct?

MR. VANDERWATER: That's correct.

THE HEARING OFFICER: Counsel, were you aware of that?

MR. LAWRENCE: I was not aware of that. On the other hand, if I had been, I do not think I would have made an issue of it.

I don't believe it is my function to enforce any rules or regulations of the State Bar.

As far as I am concerned, if a claimant wishes to be represented by a layman, that's his concern, not mine.

So I would note the fact, but as I say, I'm not constrained to make any motions or representations in consequence.

THE HEARING OFFICER: Well, do you waive any objection to the record taken at the last hearing, by reason of the fact that Mr. Vanderwater was not qualified to represent the Contestees?

MR. LAWRENCE: No objection at all, based on that instance.

THE HEARING OFFICER: Mr. Vanderwater, do you have any comments on that at all?

MR. VANDERWATER: No, sir.

THE HEARING OFFICER: Under the Departmental rules of practice set forth in 43 CFR, Section 1.3, of Part I, entitled "Who May Practice", it provides that a person must be admitted to practice before the Court.

Since you are not admitted to practice, you are not qualified to represent Mr. Gayanich at this hearing; and you were not last time.

Unless you come within some of the other provisions of that section, and I don't know that you do -- So, unless you are qualified to practice here, I cannot allow you to represent Mr. Gayanich.

You may sit at his table, and advise him, but you cannot act as his attorney.

MR. VANDERWATER: All right.

After some further discussion concerning Vanderwater's participation, the hearing proceeded with Gayanich conducting his own case with assistance from Vanderwater at his counsel table.

Following the completion of the hearing, on February 18, 1977, Judge Steiner issued his decision in which he held that the Home Plate claim was null and void. In doing so, Judge Steiner confined his opinion to an analysis of the law and the evidence adduced at the hearing, and made no reference to Vanderwater's participation. Thus, the decision was rendered strictly on the merits of the case.

On appeal Gayanich asserts, inter alia, "When I appeared at [the] hearing before the Administrative Law of Justice [sic] I was not entitled to Counsel of my own choice because my counsel was not licensed."

The right of the Secretary of the Interior to regulate practice before the Department is statutory. The Act of July 4, 1884, 43 U.S.C. § 1464 (1970), provides: "The Secretary of the Interior may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his department * * *."

Pursuant to this authority, the Department has promulgated regulations governing practice before the Department and, specifically, who may practice. 43 CFR 1.3.

The right to appear before the Department of the Interior is not an inherent right, but a privilege granted by law and subject to such limitations and conditions as are necessary for the protection both of the Department and the public. Phillips v. Ballinger, 37 App. D.C. (1911).

Judge Steiner was presiding over an official proceeding of the Department of the Interior, and was in fact the only officer of the Department present. As such he was in sole charge, and he had not only the authority but the duty to preserve the efficacy and integrity of the proceeding he was charged with conducting. 43 CFR 4.452-4. He was therefore obliged to apply and enforce the Department's regulations governing practice before him, particularly in light of Vanderwater's attempt to re-enact the violation at the second convention of the hearing.

Similar determinations that individuals were not qualified to practice before the Department have been made many times in the past by various departmental officers and boards of appeal. W. Duane Kennedy, 24 IBLA 152 (1976); Pierce and Dehlinger, 22 IBLA 396 (1975);

Haruyuki Yamane, 19 IBLA 320 (1975); United States v. Smith, 14 IBLA 309 (1974); Thomas P. Lang, 14 IBLA 20 (1973); Henry H. Ledger, 13 IBLA 356 (1973); Virginia Gail Atchison, 13 IBLA 18 (1973); Margaret Chicarello, 9 IBLA 124 (1973); United States v. Bass, 6 IBLA 113 (1972); Julius F. Pleasant, 5 IBLA 171 (1972); Martha Denny Byrum, A-30678 (Sept. 20, 1967); John W. Mecom, 70 I.D. 446 (1963); E. H. Hamlet, A-29516 (Aug. 19, 1963); Love Mae Moore, A-28717 (Oct. 30, 1971); John W. Monzel, A-28817 (Aug. 31, 1961); Kay Anne Turner, 68 I.D. 85 (1961); Ben P. Gleichner, 67 I.D. 321 (1960); Hattie M. Fults, A-27509 (Nov. 19, 1957); Lilly L. Pearson, A-27505 (Nov. 15, 1957); Phillip L. Boyer, 61 I.D. 151 (1953); Edward D. Dunn, 57 I.D. 35 (1939); Henry N. Copp, 37 L.D. 674 (1909); Edwin F. Frost, 24 L.D. 525 (1897); Casner v. Reed, 22 L.D. 86 (1896); Werden v. Schlecht, 20 L.D. 523 (1895); Driscoll v. Johnson, 11 L.D. 604 (1890); Sharitt v. Wood, 11 L.D. 25 (1890); Luther Harrison, 4 L.D. 179 (1885); Neil Dumont, 4 L.D. 55 (1885); Instructions (final sentence), 3 L.D. 112 (1884); Berry and Emery, 2 L.D. 214 (1883); Traugh v. Ernst, 2 L.D. 212 (1883). Additionally, a number of cases on this issue have been decided by land office personnel, hearing examiners, and by the BLM Director's Office and, absent any appeal, become final for the Department, although not precedential. See, e.g., William A. Elser, Anchorage 046374 (Dec. 31, 1959).

Recently this Board summarily dismissed a number of appeals filed by an individual who was found not to be qualified under the regulations governing practice before the Department. Haruyuki Yamane, supra. On judicial review, the District Court, in affirming the Board's action, stated:

> Nor is the regulation arbitrary or capricious or otherwise in contravention of plaintiffs' Constitutional rights. Parties in interest are expressly permitted to practice before the Department on their own behalf, or to have any qualified person so designated under the regulation appear for them. Plaintiffs have failed to show that their Constitutional rights of due process were in any way violated. The Secretary's motion for summary judgment is granted.

Burglin v. Secretary of the Interior, No. A 75-133 (D. Alaska Jan. 7, 1977).

Accordingly, we hold that the Administrative Law Judge acted properly in refusing to recognize Vanderwater's appearance.

[2] Appellant also offers a "laundry list" of other assertions calculated to show that the contest proceeding was so conducted as to deprive him of various constitutional and judicial safeguards. Included among these are contentions that he was wrongly denied trial

by a jury of his peers; that the judge refused to appoint counsel to represent him; that the judge failed to advise him of his constitutional rights; that evidence concerning the claim's mineralization, workings and other physical features was illegally obtained without a search warrant; that the judge wrongly placed the burden of evidence on him as the proponent of the rule or order in the case; that there was bias and prejudice demonstrated by reason of the fact that two of the contestant's witnesses, contestant's counsel, and the judge were all Federal employees; that neither the Forest Service nor the Department of the Interior has jurisdiction to decide the validity of a mining claim; that administrative contests proceedings do not afford due process of law; and that the invalidation of a mining claim by such procedure is the confiscatory taking of property without due compensation.

Most of these arguments have been advanced in prior instances and consistently have been found to be without merit. See, e.g., United States v. Diven, 32 IBLA 361 (1977); State of California v. Doria Mining and Engineering Corp., 17 IBLA 380 (1974), aff'd sub nom., Doria Mining and Engineering Corp. v. Morton, 420 F. Supp. 827 (1976), appeal pending; United States v. Dummar, 9 IBLA 308 (1973); United States v. Zerwekh, 9 IBLA 172; and cases therein cited.

Although the contestee in a government contest proceeding under the Administrative Procedure Act has a right to be represented by counsel, the Department of the Interior has no duty under the Act or the Constitution to provide such counsel for him. Eldon Brinkerhoff, 24 IBLA 324, 81 I.D. 185 (1976). In such an administrative contest proceeding, the administrative law judge is under no obligation to explain to or advise the contestee of all of the rights guaranteed him by the Constitution, or any of them, unless some specific constitutional claim of right or privilege is asserted to the judge at the hearing, in which event the judge may allow or reject the assertion with or without explanation. Further, a mineral examiner in the employ of a federal agency having management jurisdiction over the land occupied by an unpatented mining claim is not required to obtain a search warrant to enter the claim and take mineral samples and photographs, or gather other evidence relating to the validity of the claim or its use and occupancy by the claimant. Legal title to the land is vested in the United States. Moreover, it is the duty of a mining claimant whose claim is being contested to keep his alleged discovery points available for inspection by government mineral examiners. United States v. Bechthold, 25 IBLA 77 (1976); United States v. Bryce, 13 IBLA 340 (1973).

Our review of the record in this case establishes that Judge Steiner's decision is well supported by the evidence and constitutes a proper application of the law.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

James L. Burski
Administrative Judge